

BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the APPEAL FROM THE
RULING OF THE CALIFORNIA HORSE
RACING BOARD OF STEWARDS of:

EDWARD DELAPLANE,

Appellant.

OAH NO. L-2000010589

CASE NO. SAC-99-072

PROPOSED DECISION

This matter came on regularly for hearing before Roy W. Hewitt, Administrative Law Judge (“ALJ”), Office of Administrative Hearings, at Los Angeles, California on March 1, 2000. R. Mitchell Mays, Esq. represented appellant, Edward Delaplane. Deputy Attorney General Thomas Scheerer represented respondent, the California Horse Racing Board (“CHRB”).

Documentary evidence was received and the matter was submitted.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. At all relevant times appellant, Edward Delaplane was licensed as a trainer within the jurisdiction of the CHRB, and was trainer of record for the horse “Slew O’ Aces”.

2. On June 18, 1999, the CHRB issued an initial complaint against appellant alleging violations of Title 4 of the California Code of Regulations (“Regulations”) sections 1843 (a) (Medication, Drugs, and Other Substances), 1887 (a) (Trainer to Insure Condition of Horse), and 1859.5 (Disqualification Upon Positive Test), based on the fact that a test sample taken from his horse, Slew O’ Aces, following a second place finish in the sixth race at Hollywood Park Operating Company on May 16, 1999, tested positive for “Isoxsuprine”, a class 6 drug.

3. On June 23, 1999, the matter of the violations set forth in Finding 2, above, was heard before the Board of Stewards.

At the hearing, appellant was advised of his rights pursuant to the California Administrative Procedure Act and he availed himself of the right to a full

hearing including the right to examine and cross-examine witnesses, the right to introduce relevant evidence and the right to make closing statements/argument. He waived his right to be represented by counsel.

4. After a full and fair hearing, the Board of Stewards concluded respondent violated Regulations section 1843 (a) (Medication, Drugs and other Substances-Isoxsuprine-Class 6). The Board of Stewards also found that appellant, as Slew O' Aces trainer, violated Regulations section 1843 by not complying with the obligation of Regulations section 1887 (c) to insure that no prohibited substances were present in Slew O' Aces at the time of the race.

5. On June 24, 1999, as a result of their Findings of Fact, the Board of Stewards ordered that that appellant pay a \$300.00 fine.

6. Appellant immediately paid the \$300.00 fine. He did not appeal the Board of Stewards' Official Ruling.

7. On June 1, 1999, Truesdail Laboratories, Inc. notified the Board that the urine sample taken from Slew O' Aces on May 16, 1999, was found to contain Albuterol, a class 3 drug substance in excess of the permitted level¹. It is unclear why the presence of Albuterol and Isoxsuprine were not included in the same report from Truesdail Laboratories, Inc.². In any event, based on the June 1, 1999 report, the CHRB initiated an additional action against appellant for violations of Regulations sections 1843 (a) (Medication, Drugs, and Other Substances), and 1887 (a) (Trainer to Insure Condition of Horse).

8. On July 18, 1999 and November 4, 1999, the matter of the violations set forth in Finding 7, above, was heard before the Board of Stewards at Hollywood Park, Inglewood, California and at Santa Anita Race Track, Arcadia, California. Appellant's current attorney, R. Mitchell Mays, Esq, represented appellant at the hearing(s).

9. Based on the evidence presented at the July 18 and November 4, 1999 hearings, the Board of Stewards determined that cause exists for disciplinary action pursuant to Regulations sections 1843 (a) and 1887 (a). Accordingly the Board of Stewards issued orders ordering the disqualification of Slew O' Aces pursuant to Regulations section 1859.5, and ordering that appellant pay a \$2,500.00 fine and that he be suspended for fifteen (15) days.

///

¹ Pursuant to Title 14 California Code of Regulations section 1844, subdivision (e), subsection (4): "The official urine test sample may contain any of the following drug substances, their metabolites or analogs, in an amount that does not exceed the specified levels....(4) Albuterol; 1 nanogram per milliliter."

² The report indicating the presence of Albuterol was dated June 1, 1999, and the report concerning Isoxsuprine was dated June 2, 1999.

10. On November 8, 1999, appellant timely appealed the Stewards' Decision and requested a Stay. Appellant's request for a stay was granted on November 9, 1999, and the instant hearing ensued.

11. At the instant hearing on appeal, the ALJ received, read and considered copies of the Board of Stewards Ruling, the Order Granting Stay, the transcripts of the July 18, 1999 and November 4, 1999 hearing(s) before the Board of Stewards, the Exhibits from the hearings, appellant's and respondent's hearing brief(s), the oral arguments of counsel, and all other relevant materials presented on appeal. A review of these materials establishes the following relevant facts.

12. The evidence presented at the July 18, 1999 hearing established the facts set forth in Findings 13, 14, and 15, below.

13. Albuterol is a class 3 drug that acts as a bronchodilator. Slew O' Aces had been receiving Albuterol in the past, however, as is appellant's custom and practice, Slew O' Aces was not intentionally given Albuterol for at least 5 days prior to race day, May 16, 1999³. However, on May 14, 1999, appellant's head groom dislocated his shoulder and appellant took him to the hospital at approximately 9:00 a.m. The two were at the hospital all day. Apparently, while appellant and his head groom were at the hospital, one of appellant's employees, Martin Cervantes, may have inadvertently given Slew O' Aces another horse's feed, feed which contained the Albuterol⁴.

14. Slew O' Aces raced in the sixth race at Hollywood Park Operating Company on May 16, 1999. He finished second place in the race. After the race, urine and blood samples were taken from Slew O' Aces. Subsequent testing revealed the presence of Albuterol "which exceeds the permitted level". Dr. B. William Bell, D.V.M. established that a permitted drug, such as Albuterol, is only reported as a "positive" finding if it exceeds the allowable amount, which in the case of Albuterol is one nanogram per milliliter.

15. During the July 18, 1999 hearing, appellant filed a Motion for Directed Verdict, and a Motion for Dismissal. The Motion for Directed Verdict was based on appellant's contention that because no actual quantification of the Albuterol was presented at the hearing, the CHRB failed to establish that the Albuterol in Slew O' Aces urine exceeded the allowable one nanogram per milliliter. The Motion for Dismissal was based on appellant's contentions that the CHRB violated the double jeopardy clauses of both the Federal and State Constitutions, and violated respondent's rights of Due Process, Equal Protection by bringing two separate actions

³ The written instructions written on the Albuterol bottle recommend a five-day withdrawal time.

⁴ Another of appellant's horses, Irish O' Dandy, a horse not due to race, was scheduled to receive feed containing Albuterol. The feed tubs had the horses names and stall numbers written on them, however, it is possible Mr. Cervantes got the feed tubs mixed up.

against him based on the results of tests conducted on blood and urine samples taken from Slew O' Aces after the May 16, 1999 race, that the Regulations are vague, overbroad and unconstitutional on their face and as applied, and that dismissal is warranted pursuant to Regulations section 1888, subdivision (c).

As a result of appellant's motions, the Board of Stewards elected to continue the matter so that they could have their legal representatives, the Office of the Attorney General, advise them concerning the legal arguments, and so they could receive and consider further evidence.

16. On November 4, 1999, the Board of Stewards reconvened the hearing. At the continued hearing appellant received a 10 page document from the Department of Justice concerning appellant's legal arguments and received evidence that the amount of Albuterol in the urine sample taken from Slew O' Aces after the May 16, 1999 race contained 93 nanograms of Albuterol per milliliter, well in excess of the 1 nanogram per milliliter allowed by Regulations section 1844, subdivision (e), subsection (4).

The Board of Stewards heard and considered appellant's arguments on his Motions for Directed Verdict and to Dismiss, and then denied those motions. On appeal, appellant asserts those same motions.

LEGAL CONCLUSIONS

Based upon the foregoing Factual Findings, the Administrative Law Judge makes the following Legal Conclusions:

1. The Board of Stewards properly denied appellant's motions to Dismiss and for Directed Verdict. Principles of Double Jeopardy do not preclude the CHRB from bringing two separate actions against appellant based on two separate drugs found in one sample of urine. Although the concept of judicial economy would dictate that one action, not two, would be the most cost effective and efficient way to proceed, the concept of Double Jeopardy does not preclude the splitting of actions in administrative matters. (See *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.App.3d 208, 222.) Appellant's Due Process and Equal Protection Rights were not violated either. Appellant was treated equitably and received adequate notice of the nature of the charges against him and he received and availed himself of his opportunity to be heard. Appellant received a full and fair hearing where he was represented by counsel, examined and cross-examined witnesses, and presented evidence in his defense. There was nothing improper about the Board of Stewards decision to continue the hearing from July 18, 1999 to November 4, 1999 to consider appellant's legal arguments and for the presentation of additional evidence. Appellant was provided the legal analysis done by the Department of Justice for the CHRB and the Board of Stewards allowed appellant to respond to the position taken by the Department of

Justice. The additional evidence quantifying the amount of Albuterol was properly received and appellant was afforded the opportunity of cross-examining the expert opinion(s) presented by the CHRB. Although appellant objected to the continued hearing, and to the evidence presented at the hearing, he did not request any further continuance to rebut the evidence presented against him. It is also noted that the evidence produced during the November 4, 1999 continued hearing was merely cumulative. As set forth in Finding 14, it was established at the July 18, 1999 portion of the hearing that Albuterol was present in Slew O' Aces' urine in excess of the allowable one nanogram per milliliter limit. Accordingly, Regulations section 1859.25, subdivision (d), subsection (1) did not, and does not support appellant's Motion for Directed Verdict.

Appellant is also incorrect in his assertion that Regulations section 1844, subdivision (e), subsection (4) is unconstitutionally vague. Section 1844, subdivision (e), subsection (4) clearly and unequivocally states that the official test sample of urine can not exceed one nanogram per milliliter. (See footnote 1, at page 2.) Furthermore, the fact that Regulations section 1844, subdivision (b) states: "No drug substance, other than authorized bleeder medication, shall be administered to a horse entered to race within 24 hours of the race in which entered" does not lead to an ambiguity, nor does it conflict with subdivision (e), subsection (4). In the present instance, had appellant stopped treating Slew O' Aces with Albuterol five days in advance of the race, as he intended to do, he would have been in compliance with both subdivisions of section 1844. He would not have administered any drug substance to Slew O' Aces within 24 hours of the race, and any traces of the Albuterol would, if the label on the Albuterol is correct, be below the concentration of one nanogram per milliliter. Unfortunately, as we now know, this did not occur. Although appellant seems to have complied with section 1844, subdivision (b), he failed to comply with subdivision (e), subsection (4).

Finally, Regulations section 1888, subdivision (c) does not mandate dismissal of the charges. Regulations section 1888, subdivision (c) merely allows appellants to present mitigating evidence. A review of the record reveals that appellant availed himself of this right, and the Board of Stewards took appellant's evidence of mitigation into account in determining the proper level of discipline to be imposed on appellant.

2. As set forth in the Factual Findings, above, substantial evidence supports the Board of Stewards' Findings and Conclusions. Additionally, the penalty(ies) imposed by the Board of Stewards is/are not excessive on their face. The Board of Stewards considered the evidence in mitigation and properly concluded that the best interests of racing would be served by forfeiture of the purse, 15 days suspension and a \$2,500.00 fine. Accordingly, the Board of Stewards' determination and order are upheld.

///

///

///

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Appellant's appeal of the November 8, 1999 Board of Stewards Findings and Order is denied. The November 9, 1999 Order Granting Stay is vacated, and the Board of Stewards Decision is upheld in its entirety, and shall become effective forthwith.

Dated: March _____, 2000.

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings